Kleinfeld, J., dissenting:

I respectfully dissent.

Golden Eagle insured a company, Federal covered its executives. Both the company and one of its executives were sued, attorneys were hired, and the case settled after some preliminary negotiations. Federal paid its agreed upon share and each insurance company closed its files in January of 1998. As far as Federal knew, the litigation was settled and over.

Six months later, the settlement somehow fell apart and litigation resumed. The company resubmitted the claim to Golden Eagle, Golden Eagle hired new attorneys, and the case headed towards trial. The problem is that nobody told Federal until two years and $138,573.97 in attorneys's fees later.[1] In December of 2000—after the $138,000 in attorneys fees was incurred—Golden Eagle contacted Federal, told it that the settlement had failed two years earlier, and informed it that a trial date was set for January. Golden Eagle also explained that it was looking for a way out of the case. Golden Eagle did not tell Federal that it might be liable

[1] This figure is based on page 597 of the Excerpt of Record showing the amounts paid by Golden Eagle for defense costs. The figure does not appear in the excerpt, but rather individual costs such as $250 filing fees appear in the excerpt. $138,573.97 is the sum of bills paid prior to December 1, 2000.

for part of the judgment or request that Federal contribute to the defense.

Federal does not have a duty under its policy to pay defense costs or any portion of a judgment unless it is first notified and consents. Paragraph 10 of Federal's insurance policy makes written notice "a condition precedent" to any coverage. Paragraph 11 requires "written consent" from the company before "incur[ring] any Defense Costs."

Paragraph 11 also gives Federal the right to associate in the defense and settlement. It was deprived of these rights and the condition precedent was not satisfied.

Federal was thus deprived of its opportunity to demand separate counsel for the company and its executive, whose interests might well conflict and who were separately represented in the earlier litigation. This case is materially similar to Truck Insurance Exchange v. Unigard Ins. Co.[2] As Truck held, "absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy."[3] There are no "compelling equitable reasons" that entitle one insurance company to take $200,000 from another despite absence of notice and breach of the duty to associate the other in

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[2] Truck Ins. Exchange v. Unigard Ins. Co., 79 Cal.App.4th 966 (2000).

[3] Id. at 975.

the defense. An insurer cannot be charged with refusing to do what it was not asked to do.

Nor is this a breach of the duty to defend a case. Federal's policy provides in paragraph 11 that "it is the duty of the Insured Persons and not the duty of the Company to defend." Federal's duty is limited to payment, and that duty is conditioned upon notice and effective association in the defense. Federal can owe money in this case only if its insurance policy obligated it to pay money. The policy quite clearly does not require payment when, as here, there was no notice and no effective association. Golden Eagle, the insured company, and the insured executive received notice of the claim. Golden Eagle engaged counsel and controlled the defense. Thus, Golden Eagle, not Federal, is obligated to pay the defense costs it incurred.